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In The

Supreme Court of the United States

RICHARD VIETH, *et al.*,

Appellants,

v.

ROBERT C. JUBELIRER AND JOHN M. PERZEL, *et al.*,

Appellees.

On Appeal From The United States District Court For The Middle District Of Pennsylvania

BRIEF OF THE CENTER FOR RESEARCH INTO GOVERNMENTAL PROCESSES, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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Bush v. Vera, 517 U.S. 952 (1996) 10

Carrington v. Rash, 380 U.S. 89 (1965) 8

Cummings v. Meskill, 341 F. Supp. 139 (D. Conn. 1972) 11

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Gaffney v. Cummings, 412 U.S. 735 (1973) 11, 23

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 10

Greenberg v. Bolger, 497 F. Supp. 756 (E.D.N.Y. 1980) 9

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Williams v. Rhodes, 398 U.S. 23 (1968) 9, 10

OTHER AUTHORITIES

Eisenberg, Arthur N., *et al.* 1985. Brief of the American Civil Liberties Union and Indiana Civil Liberties Union as *amici curiae*, *Davis v. Bandemer* 4, 5, 6, 7

Farrand, Max. *The Records of the Federal Convention of 1787*, Vol. 1 1937 ed. (reprntd 1966) Yale Univ.Press 13, 14, 15

Gelman, Andrew and Gary King. 1994. "A Unified Method of Evaluating Electoral Systems and Redistricting Plans." *American Journal of Political Science* 38:514-54 ..... 24 n.7

TABLE OF AUTHORITIES – Continued

Page

Grofman, Bernard. 1985. Criteria for Districting: A Social Science Perspective. *UCLA Law Review*. 33(1):77-184..... 24 n.7

Grofman, Bernard, ed. 1990. *Political Gerrymandering and the Courts*. New York: Agathon..... 24 n.7

Hamilton, Alexander, James Madison and John Jay. 1788. *The Federalist Papers* Mentor Book ed., 1961 16

Hardy, Leroy C. and Alan Heslop. 1990. *Redistricting Reform: An Action Program*. Claremont, California: Rose Institute of State and Local Government.....28

Horn, David L., *et al.* 1989. Can Neutral Districting Procedures Yield "Gerrymandered" Results? Presented at the annual meeting of the American Political Science Association, Atlanta, Georgia..... 29 n.9

Lawrence, Joan W. and David L. Horn. 1990. An updated and expanded version of Part I of "The Ohio Anti-Gerrymander Amendment: Impact on Representative Government": Paper delivered at the Annual Meeting of the American Political Science Association, San Francisco, California August 31, 1990. This document is microfilmed and indexed as an erratum in the 1992 APSA panel papers with University Microfilms 300 North Zeeb Rd., Ann Arbor, MI 48106. It is also incorporated in Plaintiff/Appellants' Jurisdictional statement in *Clarence E. Miller, et al. v. State of Ohio*, No. 96-471 (S.D. Ohio 1996), *aff'd*, 519 U.S. 1003 (1996).....29

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Niemeyer, Paul V. 1992. "The Gerrymander: A Journalistic Catchword or Constitutional Principle? The Case in Maryland." *Maryland Law Review* 54:242.....3, 19, 20, 21

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INTEREST OF AMICUS[1]

The Center for Research into Governmental Processes is a 501(c)(3) incorporated under the laws of Ohio in 1989 and dedicated to non-partisan research and education on how to liberate political democracy from partisan manipulation in the districting process. Its advisory board is composed of Ohio political scientists, current and past members of the Ohio General Assembly and Congress, and citizens with long-standing concern for healthy democracy.

The director, one of the trustees, and two of the advisory board members were among a group of Ohio citizens who in 1975-78 began searching for a workable alternative to discretionary districting which intimate acquaintance with Ohio politics had convinced them was a cancer on the body politic. Their labors led, in 1978, to introduction in the Ohio House of Representatives of the first proposal in American history to completely remove political discretion from the process of drawing state legislative and Congressional districts. As this proposal, called "the Ohio Anti-Gerrymander Amendment," gained attention, questions arose concerning its workability and its political consequences.

The Center's first policy investigation thus focused on the feasibility and political consequences of impartial districting procedures. With grants totaling $42,000 from the George Gund Foundation, the Center in 1989 and 1990 conducted "districting competitions" in Ohio and Indiana

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. With the consent of the parties indicated in letters being lodged with the Clerk, amicus respectfully submits this brief.

to generate both federal and state legislative districting plans drawn to satisfy objective, quantifiable criteria. These plans were then analyzed under tests for partisan bias proposed by various scholars and compared to the plans in effect in those states. This methodology led to the Director's being an invited panelist at the 1988 meeting of the American Political Science Association (APSA), and to paper presentations by Center associates at the next three meetings of the APSA. The Director has published a journal paper, is currently working on the manuscript of a book to be titled *Gerrymander Analysis and Remedy*, and has drawn many districting plans.

The Center believes it may serve the public interest to bring the matter of impartial districting procedures to the attention of this Court. It also wishes to lend support to two legal theories which, if embraced by this Court, would put an end to two centuries of political gerrymandering in the United States of America and do it without leading the Court into a political quagmire.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sometimes Americans unschooled in law assume that certain fundamental principles govern the functioning of democracy in America, and take it for granted that these principles have been recognized and embodied in legal doctrine. Governmental neutrality in the electoral process is just such a principle that most Americans readily think is part of our constitutional framework.

If one asks the person on the street whether it is constitutional for a state government to take sides in an election between two candidates or two parties – which is what discriminatory districting ("gerrymandering") boils down to – the answer is likely to be "of course not!" Surely having the government take sides in an election is contrary

to democratic commitment to rule by the people. Countless Supreme Court cases effectively validate this reaction, but this Court has never *formally* recognized a neutrality principle in the electoral field. It has never explicitly declared that the proper role of the state in an electoral contest is that of neutral umpire rather than as a member of one of the teams or a cheerleader for this or that side.

When *Davis v. Bandemer* was before this Court eighteen years ago, Arthur Eisenberg and others, writing for the American Civil Liberties Union as *amici curiae*, extracted from the case law a general theory of governmental neutrality in religious and political controversies. Citing additional cases, they extended this theory into the realm of electoral process and concluded that the districting plan at issue in *Bandemer* violated this governmental neutrality principle and, therefore, must be voided. This Court concluded otherwise.

In the first part of the argument *amicus* revisits this neutrality principle and finds the logic of it more compelling than ever and invokes recent major cases to suggest its application to the electoral process.

In the second part of the argument *amicus* demonstrates that the Framers intended the U.S. House of Representatives to "be dependent on the people *alone*." The state legislatures were to have no substantive influence over the selection of U.S. representatives. Yet, by means of discretionary political districting today, states play a significant and often the dominant role in selecting representatives to the House.

This Court reaffirmed the principle that states are forbidden to have substantive influence over the selection of U.S. representatives in *U.S. Term Limits v. Thornton*. Judge Paul V. Niemeyer of the Fourth Circuit has independently reached the same conclusion as *amicus* about the meaning of state legislative gerrymandering for

interference with the people's right to choose their own representatives.

The third part of the argument addresses the question of remedy. First, any claim of partisan gerrymandering will falter if it turns on an effort to assert a right of guaranteed *group* representation based on ideology; no such right exists. An alternative approach is suggested based on *individual* rights. Such rights require only that a districting plan be crafted in an impartial manner that treats every citizen equally, not that it afford mathematically proportional representation to every "cognizable" group, which is a potentially infinite class. An impartial, nondiscretionary districting procedure employing objective, and quantifiable criteria to define the "best" plan provides a sound, workable and equitable remedy. A detailed description of one such procedure is provided in the appendix. The point is that there are multiple effective ways to remove political discretion from state legislatures either by [1] maintaining single-member districts but requiring neutral processes and principles to be observed in the line-drawing process or [2] adopting systems of proportional representation such as preferential, cumulative or "instant runoff" voting.

ARGUMENT

I. PENNSYLVANIA'S CONGRESSIONAL DISTRICTING PLAN VIOLATES CONSTITUTIONAL NEUTRALITY PRINCIPLES ROOTED IN THE FIRST AMENDMENT AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. General Neutrality Principles

In their *amici curiae* brief in *Davis v. Bandemer*, Eisenberg, *et al.*, developed a general theory of governmental neutrality in religious and political controversies from

eight cases involving governmental regulation of speech-making access to streets, sidewalks and parks; patronage dismissals; and access to meeting rooms in schools and universities. (Eisenberg, *et al.*, pp. 9-16).

They might have cited a ninth case in which this Court laid down the neutrality principle in the simplest and broadest of terms. In *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979), Justice Stevens, writing for a Court majority, articulated what can only be characterized as a general, unqualified principle of governmental neutrality:

> The Equal Protection Clause . . . announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle. Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether this principle is violated arise.

At issue was whether the Transit Authority's policy of refusing employment to persons currently receiving methadone treatment for curing heroin addiction violated the Equal Protection Clause. The Court majority, plus Justice Powell in concurrence, concluded that it did not. Dissenting Justices White, Brennan, and Marshall concluded that it did. Neither the concurrence nor the dissent differed with the Stevens majority over its assertion of the impartiality mandate. The disagreement was over whether it was being adhered to in the instant case. Therefore, Justice Stevens was essentially speaking for a unanimous Court when he made this declaration. He repeated it, without qualification, in the context of a discussion of partisan gerrymandering in *Karcher v. Daggett*, 462 U.S. at 748.

When plaintiffs in a political gerrymandering case seven years ago invoked the governmental neutrality principle, the lower court disposed of plaintiffs' assertion of the governmental neutrality principle in two sentences:

> "While we acknowledge that the 'concept of government as neutral referee' has been articulated in the context of specific constitutional claims, it has not yet been recognized as a discrete constitutional right. Mindful of our role as the trial court, we decline to grant relief premised on an as yet undefined constitutional right."

Miller v. Ohio, No. C2-94-1116, slip op. at 10 (S.D. Ohio, May 29, 1996), *aff'd*, 519 U.S. 1003 (1996).

B. The Neutrality Principle Applied to the Electoral Process

Eisenberg, *et al.*, in their brief demonstrated that the neutrality principle had been extended into the electoral realm by citing seventeen additional cases. They asserted:

> "The neutrality principle acquires a special force in cases involving regulation of our electoral system. In a very real sense, our electoral system is simply a more formalized and structured marketplace of expression. It is an organized competition of ideas presented by opposing candidates and political parties. As such, the obligation of governmental neutrality takes on heightened importance. For unless government remains neutral in fashioning and administering the rules of the contest, the electoral competition cannot operate fairly.
>
> "If a state were to rig voting machines so that they could only register the votes for Democratic candidates, no one would doubt that the state was not playing fairly, in a clear violation of neutrality principles. Although acts of favoritism by the state will rarely, if ever, be that transparent, courts have carefully scrutinized, and where appropriate invalidated, legislative enactments obviously designed to favor particular parties or groups." Eisenberg, *et al.*, pp. 16-17.

The object of political speech is to persuade the body politic to support or oppose a particular public policy. If the people one has persuaded are not permitted to vote, or the value of their vote is diminished or destroyed by one or another species of discriminatory electoral mechanism, then the motivating political ideas and expression are being nullified and the people are being usurped by the government. This inversion cuts against the most central commitments of democracy. As Justice Robert Jackson cogently put it in *West Virginia v. Barnette*, "Authority here is to be controlled by public opinion, not public opinion by authority. . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, shall prescribe what shall be orthodox in politics . . . " 319 U.S. 624, 641-642 (1943).

The foregoing reasoning proceeds from the First Amendment, standing by itself. A simpler line of reasoning, proceeding from the Fourteenth Amendment's Equal Protection Clause, bolsters the centrality of the governmental neutrality principle. The Court in *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996), stated that the basic idea of Equal Protection is "the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." To the citizens of our country this guarantee means that all citizens must be treated equally by government. Therefore, plaintiffs in a complaint alleging political gerrymandering state causes of action arising independently from the First Amendment and the Equal Protection Clause, as well as a neutrality principle arising *jointly* from these two foundation blocks. With this theoretical framework, let us now examine the case law.

C. Electoral Neutrality Principle: The Case Law

In *Hunter v. Erickson*, 393 U.S. 385 (1969) this Court invalidated a city charter provision subjecting fair housing ordinances to a unique referendum procedure as an unconstitutional attempt to rig the electoral process in such a way as to unfairly hinder "one group in its struggle with its opponents." 393 U.S. at 393 (Harlan, J., concurring). In this instance the neutrality principle meant that advocates of fair housing ordinances should not be forced to jump through more hoops than advocates of any other issue. That would mean the state was taking sides against advocates of fair housing ordinances.

In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) this Court overturned a statute prohibiting banks from making certain campaign expenditures in referendum elections in which interests of banks could be at stake. In so doing it regarded this attempt to prevent corporations from participating in the campaigns surrounding referendum elections as

> " . . . an impermissible legislative prohibition of [electoral] speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues . . . " 435 U.S., at 784.

In this instance the neutrality principle meant that the State could not permit opponents of corporate interests to spend money in referenda while prohibiting corporations from doing so. That would mean the State was taking sides against corporations.

In *Carrington v. Rash*, 380 U.S. 89 (1965) this Court struck down a Texas constitutional provision prohibiting armed forces personnel who moved to Texas during a tour of duty from voting in that state so long as they remained in the service. The State argued that the provision was necessary to prevent military personnel from "taking over"

communities near military bases. But this Court stated that "'fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." 380 U.S., at 94.

At issue in *Williams v. Rhodes*, 393 U.S. 23 (1968) was whether the newly-formed American Independent Party and its presidential candidate George Wallace could be placed on the Ohio ballot despite having failed to file their petitions by the State's February deadline. This Court held that Ohio's restrictive election laws taken as a whole were invidiously discriminatory and violated the Equal Protection Clause because they give the two established parties a decided advantage over new parties, *Id.*, at 30-34, and heavily burdened the First Amendment right of individuals to associate for the advancement of political beliefs and the right of qualified voters to cast their votes effectively. *Id.*, at 30-31. In this instance the neutrality principle meant that the State could not favor the Democratic and Republican parties over other parties by making it more difficult for the latter to appear on the ballot.

In *Greenberg v. Bolger*, 497 F. Supp. 756 (E.D.N.Y. 1980) a federal district court struck down the provision of the Postal Service Appropriation Act of 1980 which conferred reduced third-class mailing rates upon the Democratic and Republican parties but excluded other political parties competing for federal office in that presidential year. That court said

> Congressional debate demonstrates – what is clear from the provision itself – that the 1980 limitation was adopted to reserve the special rate for the two dominant political parties while denying it to others. 497 F. Supp., at 765.

In this instance the neutrality principle again meant – as with ballot access in *Williams* – that the State may not favor the Democratic and Republican parties over their competitors.

At the time of *Williams* there was no mechanism under Ohio law whereby one could run for office as an independent. The only way was to be the candidate of a party, and formation of a new party was a cumbersome and time-consuming process. In the wake of *Williams* the petition requirement for formation of a new party was lowered from 15 to one percent of the preceding gubernatorial vote and provision was made for independent candidates. The petition requirement for such (statewide) candidates was set at 5,000. However, the February filing deadline of *Williams* continued. In *Anderson v. Celebrezze*, 460 U.S. 480 (1983) this Court struck down this deadline that forced independent presidential candidates to file their petitions in February, whereas Democratic or Republican candidates who may not have run in the Ohio primary could be nominated at a party convention in August and still appear on the general election ballot. Thus, another ballot access case extended the neutrality principle to say that the State may not favor Democratic and Republican candidates over independent candidates.

In the area of racial discrimination the cases and issues are too numerous to elaborate. In a line of vote dilution cases stretching from *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) to *White v. Regester*, 412 U.S. 755 (1973) this Court first applied the neutrality principle to political districting. The organizing theme has been that a State may not draw legislative or congressional districts to favor whites over African-Americans or Hispanic-Americans. And now, with *Shaw v. Reno*, 509 U.S. 630 (1993) and *Bush v. Vera*, 517 U.S. 952 (1996), it appears to have invoked a kind of neutrality principle to say that a State may not use race as a dominant factor in the drawing of majority African-American or Hispanic-American districts. Ironically, this vigorous line of authority has produced the anomalous state of affairs where legislatures freely draw districts to promote the reelection of white incumbents but

are forbidden to deliberately create majority African-American or Hispanic districts.

In *Gaffney v. Cummings*, 412 U.S. 735 this Court, for the first time, extended the neutrality principle, into the realm of political districting in a non-racial context. The primary issues involved population inequality and a claimed violation of a "right to participate effectively in the political process"[2] by persons living in towns fragmented by the plan. The secondary issue was a claim of partisan gerrymandering perpetrated by a nominally bipartisan board.[3] The district court did not address the gerrymandering claim, invalidating the plan on grounds of population inequality *Cummings v. Meskill*, 341 F. Supp. 139, 148, 149 (1972). On appeal to this Court, the partisan gerrymandering claim was addressed in Part III of Justice White's opinion. 412 U.S., at 751. The majority concluded that, as a matter of fact, the plan was not a partisan gerrymander, implying that if it *had* been it could have been struck down. Thus the neutrality principle was extended a few centimeters. In this instance the neutrality principle meant that a State may not draw legislative districts to favor the Republican Party over the Democratic Party – and vice versa. That would mean the State was taking sides in favor of one major party and against the other.

Thirteen years later this Court, in *Davis v. Bandemer*, 478 U.S. 109 (1986) pushed the neutrality principle a few centimeters further by affirming what *Gaffney* only implied: a State may not draw legislative districts to favor one major party over the other to a degree that would

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[2] See Plaintiffs' Complaint *Cummings v. Meskill* Civil Action No. 14,736 U.S. Dist. Ct. (D. Conn.) Allegation No. 12, pp. 8-9.

[3] *Ibid*, Allegation Nos. 15 and 16, p. 11.

mean one party has "essentially been shut out of the political process." 478 U.S., at 139. A partisan gerrymander of that severity has never been drawn and never will be drawn. Consequently, *Bandemer* will (if Defendant/Appellees prevail in the case at bar) become a dead letter. The *Bandemer* plaintiffs might have done better had they alleged violation of individual rights rather than group rights; had they proffered credible alternative plans; and if they had a sound, workable and equitable remedy to offer. This speculation aside, *Bandemer* is mainly significant because it reflected the fact that a majority of this Court felt uneasy about political gerrymandering but knew of no remedy that would not lead it into a morass.

The foregoing cases established an electoral neutrality principle that applies to advocates of referenda issues, corporations, military personnel, minor political parties, independent political candidates and their supporters, racial minorities, and the major parties.

Consider also *Bullock v. Carter*, 405 U.S. 134 (1972), which invokes *personal* and *individual* rights to extend the electoral neutrality principle to individual candidates for elective office. The plaintiffs were three candidates for local office in the Texas Democratic primary who challenged a Texas statute which in their cases required payment of filing fees of $1424.60, $6300 and $1000, respectively. The three-judge lower court concluded these fees fell with unequal weight upon candidates and voters according to their ability to pay the fees and, therefore, needed to be "closely scrutinized." Such scrutiny led the panel to rule that the statute violated Equal Protection. This Court upheld that ruling 7-0, extending the neutrality principle to say that, even where a state does not absolutely guarantee a certain result, it cannot arrange the process to favor wealthy candidates over less-affluent ones.

Amicus concludes from the foregoing cases that a governmental neutrality principle permeates our constitutional jurisprudence and does, indeed, apply to the electoral process. In fact, one cannot find a single case, when the issue was before this Court, where it did not come down on the side of governmental neutrality. State election laws are usually fair and even-handed, oftentimes meticulously so.[4] Yet we find a glaring and massive exception in the case of districting laws where partisan and personal favoritism and vindictiveness are allowed to run amok.

II. THE STATE LEGISLATURE'S DISTRICTING PLAN USURPS THE EXCLUSIVE RIGHT OF THE PEOPLE OF PENNSYLVANIA TO CHOOSE THEIR REPRESENTATIVES TO CONGRESS AND THUS VIOLATES ARTICLE I, SECTION 2 OF THE CONSTITUTION

A. The Federal Convention of 1787

The first substantive business conducted by the federal convention was debate and voting on fifteen resolutions – collectively known as the "Virginia plan" – offered by delegate Edmund Randolph on Tuesday, May 29, 1787. The first clause of the fourth of these resolutions was

> "Resolved that the members of the first branch of the national legislature ought to be elected by the people of the several states every for the term of ;" (Farrand, p. 20)

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[4] *E.g.*, the case of requiring candidate names to be alphabetically rotated among precincts so that the candidate whose name comes first alphabetically will not have an advantage due to the propensity of some voters to blindly check the name at the top of the list.

Debate on this resolution took place on Thursday, May 31. Six delegates spoke during the debate: delegates Mason, Wilson, and Madison supporting the resolution; delegates Pinckney, Gerry (*sic*) and Sherman opposing it. Delegate Gerry spoke twice. A reading of the record of this debate – whether from the notes of Madison, Yates, King or Pierce – shows that the proposed alternative to having "the people" choose those members was to have the state legislatures do it. No other method was proposed. (Farrand, pp. 48-50)

No opponent of the resolution offered the argument that the state legislatures could act as the surrogates of the people because they were "the voice of the people." *Anne Arundel Co. v. State Admin. Bd.*, 781 F.Supp 394, 400 (D.Md. 1991). The issue was whether the people *or* the legislatures should have this prerogative. Gerry, in particular, did not want to entrust this responsibility to the people. He said

> "The people . . . are the dupes of pretended patriots. In Massachusetts it has been fully confirmed by experience that they are daily misled into the most baneful measures and opinions . . . " (Farrand, p. 48)

Gerry was unsuccessful in persuading a majority of his colleagues. When the vote was taken six state delegations supported the resolution; only two opposed it. Two delegations were divided. (Farrand, pp. 46, 50)

Debate then turned to the fifth resolution which proposed "that the members of the second branch of the National Legislature ought to be elected by the first . . . " This proposition failed on a 3-7 vote. From June 1 through 5 the convention gave first consideration to the remaining resolutions, at the conclusion of which it passed a motion by delegate Pinckney to reconsider – on the following day – its May 31 decision endorsing the fourth resolution. (Farrand, p. 118)

On that day (Wednesday, June 6) the convention again debated whether the members of the "first branch of the national legislature" should be elected by the people, or by the state legislatures. Pinckney moved, and Rutledge seconded, to strike the word "people" and insert in its place the word "legislatures." Again, the alternatives being debated could not be clearer. Speaking in favor of the substitution were delegates Pinckney, Gerry, and Sherman. Speaking in opposition were delegates Wilson, Mason, Madison, Dickenson, and Pierce. Much the same arguments were made as on May 31. Again a vote was taken, and again "the people" prevailed: eight delegations to three. "The people" was no idle cliche. In the context of that debate it meant *as opposed to the state legislatures.* (Farrand, pp. 130-147)

The following day (Friday, June 7) the convention again took up the question of electing the *second* branch by considering delegate Dickenson's motion that this branch "ought to be chosen by the individual legislatures." (p. 148) It passed unanimously. The "first branch of the National Legislature" became the U.S. House of Representatives. The "second branch" became the U.S. Senate. The proponents of both means of selection had achieved a chamber of their liking. It remained this way until passage of the Seventeenth Amendment in 1913 gave "the people" the prerogative of choosing members of the "second branch" as well.

B. The Federalist No. 52

In *Wesberry v. Sanders*, 376 U.S. 1 (1964) this Court defined "the people" as meaning that one person's vote in a congressional election should carry as much weight as any other's. When the Governor and 253 members of the Pennsylvania General Assembly are empowered to influence the selection of the state's congressional delegation by

means of discriminatory districting, their individual votes are weighted by a factor of many thousand times the votes of their twelve million fellow Pennsylvanians.

In *The Federalist* No. 52, James Madison discusses what should be the qualifications of persons elected to the House of Representatives, and what should be the qualifications of those who do the electing. At issue with respect to voter qualifications was whether (1) states should be permitted unlimited discretion in deciding who would be eligible to vote in congressional elections, (2) the federal constitution should tell the states who would be eligible, or (3) the federal constitution should permit the states *limited* discretion in deciding who would be eligible.

The Framers chose the third option by concluding the first sentence of Article I Section 2 with the words

> " . . . the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State legislature."

In support of the Framers' decision that states should not be able to establish qualifications for voting in congressional elections any different from those regulating who chooses state representatives Madison wrote

> "To have submitted the [matter of qualifications of electors of the U.S. House of Representatives] to the legislative discretion of the states would have been improper for the additional reason that it would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people *alone*." (emphasis added)

In short, the Framers believed that election to the U.S. House of Representatives was a matter to be decided by "the people *alone*." If the Framers were unwilling to give state legislatures full discretion in setting qualifications for congressional electors, how much *more* strongly would they have opposed permitting states to pass congressional

districting laws designed to facilitate the election of certain candidates and the defeat of others.

The Framers could not have anticipated that by the device of discriminatory districting ("gerrymandering") state legislatures would find a means of exerting a significant – if not dominant – influence over the selection of U.S. representatives. Sometimes that discrimination is subtle, unacknowledged, and difficult to prove. In the case at bar, however, the discrimination is dramatic and blatant.

The Framers could only bequeath to us the *principle* that "the people alone" were to choose U.S. Representatives and leave it to those whose job it is to interpret our constitution to apply that principle in the light of unforeseen future circumstances. For "the people alone" to do this choosing there must, of course, be elections for this purpose. Not only elections, but elections conducted under impartial election laws – *including the election laws pertaining to the establishment of district boundaries.*

C. Implications of *U.S. Term Limits v. Thornton*

The constitutional imperative that "the people" be the sole and exclusive choosers of U.S. representatives was given significant reinforcement when this Court ruled in *U.S. Term Limits Inc. v. Thornton*, 514 U.S. 779 (1995). At issue was (1) whether states could impose qualifications for the offices of U.S. representative or U.S. senator in addition to those set forth by the Constitution and (2) whether a provision that does not actually prohibit an incumbent from seeking re-election, but merely keeps his name from being placed on the ballot is nevertheless unconstitutional.

In an extensive examination of the records of the federal convention and the ratification debates this Court

ruled against term limit proponents on both counts. It is now settled law that states cannot impose term limits on federal officials; and a state law that enables an incumbent to seek re-election only through write-in votes is likewise proscribed. The issue here is whether a state, by discriminatory congressional districting, is similarly imposing additional qualifications for U.S. representatives. And if it is, what is the "additional qualification"?

Amicus submits that an "additional qualification" is, indeed, being imposed. The qualification is that the congressional candidate meet with the ideological and/or personal approval of the State – or more precisely, the approval of those individuals who hold power in a particular state at a particular moment. Plaintiffs in the case at bar would probably assert that Democratic Representatives Robert A. Borski and Frank R. Mascara failed to meet the partisan and ideological qualifications erected by the State of Pennsylvania in 2001 when it crafted the congressional districting plan under litigation. Each found himself in a district of bizarre configuration, heavily Democratic in orientation, and containing the residence of another Democratic incumbent. Most of the population of their "new" districts came from the "old" district of the other Democrat incumbent they were "paired" with.

Borski decided retirement was a better choice than running against fellow Democrat incumbent Joseph M. Hoeffel in the 2002 Democratic primary. Mascara decided to go against fellow Democrat John P. Murtha in the 2002 Democratic primary and lost. A third Democrat incumbent, Representative Tim Holden, suspects that he, also, failed to meet the partisan and ideological qualifications imposed by the State of Pennsylvania for congressional candidates in 2002. He found himself in a heavily Republican district containing the residence of Republican incumbent George Gekas. He faced Gekas in the general election and, contrary to expectations, eked out a 51-49 victory.

Defendant/Appellees in the case at bar might argue that discriminatory districting is not "on all fours" with a term limits law because the former is not certain to succeed, whereas the latter is. Holden's experience appears to buttress this argument. But the answer was given by this Court in Part IV of its opinion in *U.S. Term Limits*, 514 U.S., at 830-831: the fact that a popular incumbent whose name has been kept off the ballot by a state term limits law might still manage to get re-elected by write-in votes does not render such law constitutional. This court held "that a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." 514 U.S., at 836. Similarly, the fact that a candidate who is a victim of discriminatory districting might win anyway does not render constitutional a districting plan that has an invidious purpose and "has the likely effect of handicapping a class of candidates."

Whatever may be the differences between a congressional term-limits law and a discriminatory congressional districting law, both have the intent and effect of diluting the power of "the people alone" to choose their U.S. representatives and for that reason are unconstitutional.

D. Judge Niemeyer's Discovery

Amicus is not the only observer to notice how state governments have, by discriminatory districting, pre-empted a major role in the selection of U.S. representatives. One federal appeals judge, in the course of adjudicating a *Karcher* claim in the 1991 congressional redistricting of Maryland, made the same discovery.

In *Anne Arundel County Republican Central Committee v. State Administrative Board of Election Laws*, 781 F.Supp. 394 (D.Md. 1991) plaintiffs alleged two constitutional violations: (1) a *Karcher* claim of failure to make a

good faith effort to achieve precise population equality among the eight new districts and (2) an Article I Section 2 claim that by fragmenting Anne Arundel County among four districts the plan "deprived the plaintiffs of an opportunity to effectively participate in the political process."

The state's plan achieved a population spread of 10 persons, but the legislature also had before it a plan with a spread of 9 persons. The Panel majority held that the state must justify its choice of the plan having the greater spread; and when such justification was proffered accepted it and upheld the plan. The dissenting judge (Paul V. Niemeyer) held that the state did *not* have to justify its greater deviation. Therefore, all three judges held for defendants on the *Karcher* claim.

The Panel split over the Article I, Section 2 claim with the majority ruling that Article I, Section 2 does not prohibit a state from taking "political" factors into account in crafting a districting plan. They stated that relief from political discrimination was available under the First and Fourteenth Amendments. Judge Niemeyer, on the other hand, argued that the legislature "drew . . . district lines to depict the classic gerrymander in an attempt to control the outcome of future congressional elections" and in so doing "the people are not represented directly and equally, as required by Art. I, Sec. 2." 781 F. Supp. 394, 401.

In his lengthy dissent, which skirts the argument made above, Niemeyer notes the same debate at the federal convention as does amicus, with its decision that the people, as opposed to state legislatures, were to elect the members of the U.S. House of Representatives. At one point he states

> " . . . it must be concluded that the right of the people to elect directly their representatives . . . means nothing if the Constitution does not forbid the states from manipulating the boundaries of congressional districts in attempts to influence the outcome of the people's congressional elections." 781 F. Supp. 394, 408.

But Niemeyer's argument faltered at the point of prescribing a remedy that would secure this "right" of the people – without leading the courts into a morass. He states "we are left with criteria for creating districts in a manner that is 'neutral;' " then goes on to cite "geological structures and long-standing boundaries, including state, municipal, and county subdivision boundaries," and finally "compactness and contiguity." He did not say how such "neutral" criteria can be organized in a manner that would afford a clear-cut demarcation between what the courts must accept and what they must reject.

The majority, sensing that Judge Niemeyer's prescription could lead their Panel into a quagmire, noted

> "What constitutes political gerrymandering going so far beyond the pale as to be unacceptable . . . is hard to define . . . We can well afford . . . leaving to another day . . . and another case the task of establishing federal constitutional limits to gerrymandering in congressional districting." 781 F. Supp. 394, 400 (n. 11)

The majority also noted that

> " . . . the 'neutral criteria' districting called for by the dissent would in no way ensure maintenance of the territorial integrity of Anne Arundel County, which is what brought on this suit in the first place." 781 F. Supp. 394, 398.

They observed that four other counties had been fragmented by the plan and "doubted" that "the territorial of Anne Arundel County is a classification." *Id.*, 400. Their conclusion was that "a federal court should think long and hard about rejecting the reasons – the justification – of the state legislature." *Id.*, 400.

Indeed it should.

But the Panel majority could not deny the Framers' mandate that U.S. representatives ought to be chosen by "the people." Niemeyer, on the other hand, could not persuade the majority that there was any means by which "the people" could exercise their prerogative without imposing upon the courts "a sort of judicial receivership" that would obligate them to "ultimately conduct redistricting." *Id.*, 399 The majority attempted to escape this dilemma by erecting a straw man:

> " . . . the 'people' of the State of Maryland cannot in 1991, even if they could have done so in 1789, practically be heard individually *via* a statewide town meeting of the whole. The most direct channel of action by 'the people' is *via* their elected representatives in both houses of Maryland's legislature . . . " *Id.*, 400.

The alternative to state-sponsored election rigging is neither "a statewide town meeting" nor "a sort of judicial receivership."

III. THE AVAILABILITY OF NEW AND IMPARTIAL DISTRICTING PROCEDURES NULLIFIES THE ASSUMPTION THAT "POLITICAL CONSIDERATIONS ARE INSEPARABLE FROM DISTRICTING," AND MAKES IT PERFECTLY PRACTICABLE FOR STATES TO RESPECT THE ELECTORAL NEUTRALITY PRINCIPLE AND ALLOW "THE PEOPLE" TO CHOOSE THEIR REPRESENTATIVES TO CONGRESS

For most of the past two centuries it was assumed that discretion was a necessary and inescapable component of political districting, an assumption articulated by Justice

White's statements to that effect in *Gaffney*.[5] If that were so, then there would be no practical alternative to permitting states to engage in discriminatory districting and the courts would be justifiably prudent in staying out of the "political thicket" by letting states district as they see fit.

But the advent of impartial districting procedures has changed all that. The means are now at hand to implement both the electoral neutrality principle in the realm of political districting and the people's constitutional right to be the exclusive choosers of U.S. representatives. However, before discussing such procedures, it is prudent to consider four major objections to the justiciability of political gerrymandering cases.

A. Objections to the Justiciability of Partisan Gerrymandering

Those objections, many of which can be found in Justice O'Connor's opinion in *Davis v. Bandemer*, rest in large measure upon the perception that gerrymander claims involve claims of *group* rights, as opposed to *individual* rights. As Justice O'Connor observed

> "The right asserted in *Baker v. Carr* was an individual right to a vote whose weight was not arbitrarily subjected to 'debasement' . . . The rights asserted in this case are *group* rights to an equal share of political power and representation . . . *Reynolds* [*v. Sims*] makes plain that the one

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[5] The following passages have been quoted *ad nauseam* by proponents of discretionary districting:

"Politics and political considerations are inseparable from districting and apportionment." (412 U.S., at 753)

" . . . we have not . . . attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign states." (412 U.S., at 754)

> person, one vote principle safeguards the individual's right to vote, not the interests of political groups. 478 U.S. at 149.

The assertion of a "group right to . . . representation" does open up a can of worms. It raises the issue of how to delineate the group when it is based on ideology or interest rather than race, sex, or sexual orientation Any delineation of an ideological group is bound to be arbitrary.

The second objection facing a partisan gerrymander claim is closely related to the first. Assuming the group is defined with sufficient precision, then we must have a way to *measure* the degree of harm inflicted on that group. *Bandemer* triggered an explosion of interest in the academic community concerning methods of measuring partisan gerrymandering. It can be said (arguably) that five *pro*spective[6] tests for partisan gerrymandering are now extant.[7] *Amicus* has spent over a decade attempting to apply these tests to actual districting plans in Ohio and Indiana and can flatly state that all these tests are arbitrary in one way or another. Sometimes they yield contradictory conclusions.

The third objection is closely linked to the second. Assuming that consensus can be reached on how to measure the severity of the gerrymander, the next question is where along that continuum of harm is the threshold point at which the courts should intervene. What is the "bright line" separating a permissible degree of partisan bias from

[6] A *pro*spective test for gerrymandering is one that can be applied before any election has taken place under the plan. This is in contrast to a *retro*spective test which can be applied only after at least one election has occurred under the plan.

[7] See Grofman, 1985; Grofman, 1990 Chapters 6, 7, and 8; and Gelman and King, 1994.

an *im*permissible degree of partisan bias in a districting plan?

Justice O'Connor clearly perceived this third obstacle as she contemplated the standard by which the *Bandemer* plurality proposed to decide whether a plan is an unconstitutional partisan gerrymander: "when the electoral system is arranged in a manner that will consistently degrade . . . a group of voters' influence on the political process as a whole." *Id.*, 132. In her view that "standard will over time either prove unmanageable and arbitrary or else evolve towards some loose form of proportionality." *Id.*, 155. She devotes the final five pages of her concurrence to an exploration of the problems engendered by this nebulous standard. Examining the criteria *Baker v. Carr* used to define a non-justiciable "political question," she concludes a partisan gerrymandering claim presents a political question where there is "a lack of judicially discoverable and manageable standards for resolving it." *Id.*, 148.

The fourth objection concerns the remedy. In this regard it is useful to consider what might have happened in the "remedy phase" of litigation had plaintiffs prevailed in either of the two major partisan gerrymandering cases which preceded the case at bar: *Bandemer* and *Badham*. Appendix A contains the prayer from the *Bandemer* Plaintiffs' complaint. It simply asked the Panel to declare the plan "null and void," and to prohibit the state from holding elections under it. It tossed the entire remedy burden into the lap of the courts.

Appendix B contains the *Badham* plaintiffs' prayer. They are more specific: the Panel should "enunciate standards and guidelines" which the legislature would be compelled to follow in crafting a new plan. If the legislature failed to pass a new plan "in a timely manner," or if it failed to adhere to the Panel's guidelines, then the Panel

would "promulgate" its own plan. The details of the "standards and guidelines" are left to the Panel to decide.

It is easy to see how either of these remedies could lead to "a sort of judicial receivership."

B. Elements of a Remedy to Satisfy an Electoral Neutrality Principle or to Assure "The People's" Right to Choose Their U.S. Representatives

If a gerrymandering claim is litigated on the basis of an alleged violation of *individual* rights, the first three of the objections cited above disappear. It is no longer necessary to delineate a "cognizable political group." It is not necessary to measure to what extent the group's "influence on the political process as a whole" has been "degraded." It is not necessary to set a threshold of "degradation" that cannot be exceeded.

If the alleged harm is not a denial of "an equal share of political power and representation," but simply that the state has failed in its duty to "govern impartially," it becomes possible for a potential plaintiff like former congressman Frank Mascara merely to show that he has been *individually* harmed. And if the alleged harm is that the State has encroached upon "the people's" right to be the sole and exclusive chooser of its U.S. representatives, any individual *U.S.* citizen residing in the State of Pennsylvania has standing to sue.

The state's defense against the former allegation would be to demonstrate that Mascara's misfortune was the unintended consequence of an impartial districting procedure that was the embodiment of a "consistently applied" policy utilizing "nondiscriminatory" criteria. *Karcher v. Daggett*, 462 U.S. 725, 740. The state's defense against the latter allegation would be to demonstrate that its congressional districting procedure, codified into state

law, denies it the power to exert influence over who the state's congresspersons are to be.

If a governmental neutrality principle applicable to the electoral process is judicially recognized, then it is not necessary to have as a remedy a plan of geographical districts that will guarantee to every "cognizable" political group proportional representation.[8] It is only necessary that the map be arrived at in an impartial manner. And if there is judicial recognition of "the people's" right to be the sole and exclusive chooser of its U.S. representatives, then it is only necessary that the map be one in which the state government has been precluded opportunity to influence which candidates get "good" districts and which candidates get "bad" districts.

C. Alternative Ways to Achieve Impartial Districting

We then reach the question of what available options would satisfy the foregoing criteria within the framework of the nation's traditional norm of geographical districts. If this Court were to hold for Plaintiffs and order Pennsylvania to redistrict in an impartial manner, Appendix C depicts the options available to the state with which *amicus* is familiar. Logically, there are only two ways to draw districts in an "impartial manner": either by (A) an impartial person or agency having discretion or (B) by an impartial procedure which precludes discretion. It is not for the judiciary to say which alternative it must be, although it is obvious that who is an impartial person, or

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[8] Proportional representation is probably impossible to attain under *any* electoral system based on geographical districts, regardless of how drawn. This requirement could only be met by a system of proportional representation by single transferable vote. (PR/STV)

what is an impartial agency, may depend on who is answering the question. Certainly it would not suffice that the person or agency need only be acceptable to the leaders of the two major parties. He, she, or it would have to carry the trust and confidence of *every* person or group having a stake in the political process. For that reason, Alternative "A" is probably unrealistic.

Whether Pennsylvania chooses "A" or "B," federal law currently dictates that its districts be single-member. If Pennsylvania opts for an impartial procedure, it does not have to adopt any of the four such procedures identified in Appendix C as currently extant: S. 6166, HJR 4, Balanced Neutral, or A.C.T.I.O.N. It might craft its own procedure. Finally, within its single-member congressional districts, the state has the option to continue with plurality voting or to institute "majority preferential," "alternative," or "Instant Runoff Voting," methods of modified proportional representation that essentially allow voters to "district" themselves according to political belief. This Court has said

> "From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites . . . '" *White v. Weiser*, 412 U.S. 783, 794.

and the Court has recognized

> " . . . the legislature's 'primary responsibility' in the area of apportionment . . . " *Id.*, 799 (Marshall, J. concurring).

These passages have been cited by proponents of discretionary districting to authorize and justify discriminatory districting. They can just as well be read to affirm that state legislatures have the right and the responsibility to choose among the options posed in Appendix C, and to

craft districting *procedures* according to their desires and needs, subject only to the "constitutional requisite" of official impartiality.

Appendix D contains the textual portions of the "Ohio Anti-Gerrymander Amendment" that apply to congressional districting in order to afford this Court a glimpse of the technical detail necessary to ensure that there are no crippling ambiguities and that there are detailed decision rules which cover all contingencies and resolve all possible conflicts between provisions. This document has been "fine-tuned" over a period of 25 years. It has been tested to find out what its political consequences are likely to be.[9] A careful reading of it ought to convince a reasonable person that it is, indeed, possible to completely remove discretion from districting. All it takes is the will to do it.

Appendix E demonstrates – dramatically – how that will has been lacking. Despite the impressive bipartisan backing it has received in its quarter-century before the Ohio General Assembly, the Ohio Anti-Gerrymander Amendment has never been brought to a floor vote. The reason is quite understandable. For a legislature to voluntarily adopt such a measure would be for it to acquiesce in a loss of some of its power and in a dispersion of that power among millions of ordinary voters.

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[9] See Horn, *et al.*, 1989

CONCLUSION

On the wall of the Ohio State University College of Law building are these eight words of the British statesman Edmund Burke:

> Law and Arbitrary Power
> Are in Eternal Enmity

Plaintiffs, as many similarly situated plaintiffs before them, are in a struggle with the possessors of arbitrary power. *Amicus* urges this honorable Court to end that power by extending the rule of law in the realm of political districting to vindicate the rights of *all* Americans.

Respectfully submitted,

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APPENDIX A

Prayer of Original and
Amended Complaints: *Bandemer v. Davis*

WHEREFORE, plaintiffs request the Court to enter judgment declaring the House and Senate Reapportionment Laws unconstitutional as violative of the Fourteenth Amendment to the United States Constitution and Article II, Section 1, Article I, Section 23 and Article IV, Section 6 of the Constitution of the State of Indiana and that the House and Senate Reapportionment Laws are therefore null and void, enjoining the defendants from administering and enforcing the House and Senate Reapportionment Laws, and for plaintiffs' attorneys' fees and costs incurred in this action and all other relief as may be appropriate.

APPENDIX B

Prayer of Original and Amended Complaints:
Badham v. Eu (remedy-relevant portions)

WHEREFORE, plaintiffs respectfully pray:

* * *

(2) That the Court declare A.B. 2X is now and prospectively in violation of the Constitution of the United States and of the Constitution of the State of California, and is now and prospectively null and void and of no further force and effect insofar as it establishes congressional districts for the State of California.

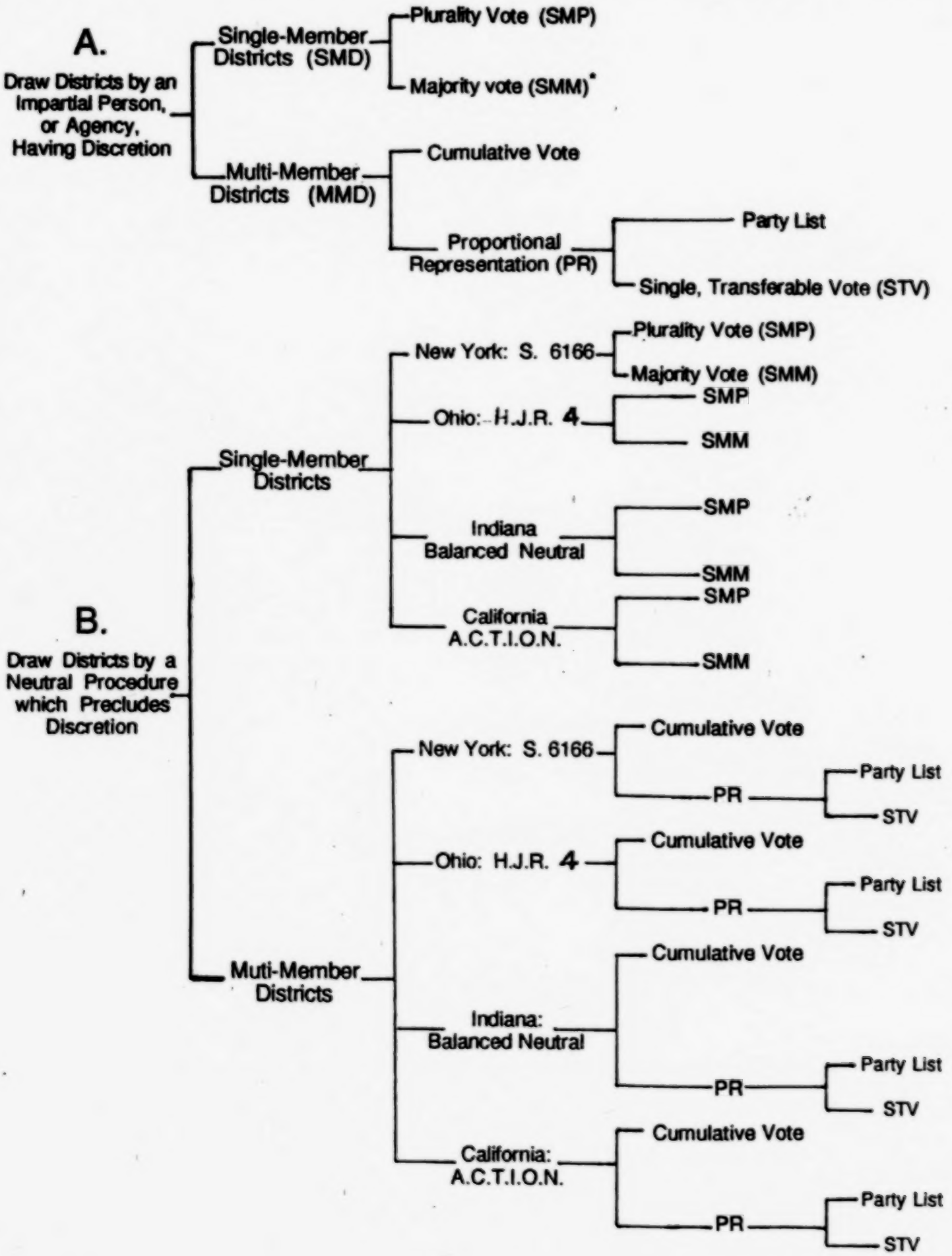
(3) That the Court permanently restrain and enjoin the Defendant from ordering or conducting any electoral processes under A.B. 2X, from ordering or conducting the primary election scheduled to be held June 5, 1984, or the general election scheduled to be held November 6, 1984, from certifying the results of either election, and from taking any other steps including the expenditure of any public funds, with respect to the election of Members of the United States House of Representatives, until there has been a further redistricting of congressional districts in accordance with constitutional requirements as approved and promulgated by the Court.

(4) That the Court promulgate a plan to redistrict the congressional districts of the State of California in such manner as to meet federal and state constitutional requirements if the California Legislature fails to adopt, in a timely manner, a congressional redistricting statute pursuant to constitutional standards and guidelines enunciated by the Court.

* * *

APPENDIX C

ALTERNATIVE WAYS OF IMPLEMENTING A CONSTITUTIONALLY-MANDATED NEUTRALITY PRINCIPLE IN POLITICAL DISTRICTING



* A majority vote within a single-member district can be obtained by employing a Majority Preferential voting system. This is also called the Alternative Vote.

APPENDIX D: PROVISIONS OF OHIO ANTI-GERRYMANDER AMENDMENT APPLICABLE TO CONGRESSIONAL DISTRICTING

Section 1. In each year ending in one and only at that time, this state shall be divided into as many congressional districts as there are seats in the United States house of representatives apportioned to the state.

Section 2. The whole population of the state, as determined by the most recent federal census, shall be divided by the number of United States representatives apportioned to the state pursuant to that census, and the quotient shall be the ratio of representation in the congress for the next ten years.

Section 3. The population of each congressional district shall be as nearly equal as practicable to the congressional ratio of representation, as provided in Section 2 of this Article, and no such district shall contain a population of less than ninety-nine percent or more than one hundred one percent of that ratio.

Section 5. District boundaries established pursuant to this Article shall not be changed until the ensuing federal decennial census and the ensuing apportionment except as provided in Section 12 of this Article, notwithstanding the fact that boundaries of political subdivisions or city wards within a district may be changed during that time.

Section 6. (A) As used in this Article:

(1) "Perimeter segment" means a portion of the perimeter of this state or of a township, municipal corporation, census tract, or block numbering area, or unit thereof as established in division (D) of this section, that

coincides with the perimeter of another state or of another township, municipal corporation, census tract, or block numbering area, or unit thereof.

(2) "Census tract," "block numbering area," and "census block group" mean the geographical units designated by these terms in the most recent federal census and include any comparable geographical units called by other names in a federal census after the effective date of this amendment.

(3) "County fragment" means one of the portions of a county resulting when a county is divided between two or more congressional districts. The number of fragments shall equal the number of different districts with territory within the county.

(4) "Municipal fragment" means one of the portions of a municipal corporation resulting when a municipal corporation is divided between two or more congressional districts. The number of fragments shall equal the number of different districts with territory within the municipal corporation.

(5) To determine the "compactness ratio" of districts for purposes of this Article, each person submitting a plan shall:

(a) compute the area of each district in his plan;

(b) compute the perimeter of each district in his plan;

(c) compute the compactness ratio of each district in his plan by dividing the area of each district by the square of its perimeter;

(B) On the first day of May in each year ending in one, the secretary of state shall, by public notice, invite any person to submit a plan for dividing the entire state into congressional districts. Any person intending to submit a plan shall file a notice of intent with the secretary of state by the fifteenth day of May, along with a fee in an amount to be fixed by law not to exceed one hundred dollars for each plan.

(C) On the first day of June of the same year, the secretary of state shall publish and distribute to any person who filed a notice of intent to submit a plan, paper documents indicating the population, length of perimeter segments, and area of each county, township, municipal corporation, census tract, and block numbering area in the state whose population does not exceed a threshold equal to one percent of the ratio of representation in congress.

(D) The secretary of state shall divide any township, census tract, or block numbering area whose population exceeds the threshold defined in this section, or which contains parts of more than one municipal corporation, into the fewest possible units of contiguous territory containing populations not exceeding the threshold or containing parts of more than one municipal corporation. When it is possible to perform such divisions in more than one way the secretary of state shall make that division resulting in the most compact units, as defined in Section 9(D) of this Article. The secretary of state shall include in the documents published under this division the population, length of perimeter segments, and area for each such unit.

(E) Information published by the secretary of state pursuant to this division, including census data and

measurements made using established cartographic techniques, shall be presumed to be accurate.

Section 7. Each plan submitted pursuant to an invitation issued under Section 6 of this Article shall cover the entire state and shall be submitted in the manner prescribed by the secretary of state. The secretary of state shall require that each plan include a summary sheet listing the population and compactness ratio of each district in each plan, the identity of each county divided by the plan, the number of county fragments resulting from the plan, the identity of each municipal corporation divided by the plan, and the number of municipal fragments resulting from the plan. The summary sheet shall include a statement, signed by the person submitting the plan, attesting that the criteria in Section 8 of this Article have been met. All plans shall be filed with the secretary of state not later than the first day of July in each year ending in one, and subsequent to that date shall be available for public examination.

Section 8. The secretary of state shall examine the summary sheet of each plan submitted under Section 7 of this Article and determine whether the plan described in the summary sheet apparently conforms to the following criteria:

(A) The plan shall meet the appropriate district population requirements of Section 3 of this Article.

(B) Each township, municipal corporation, census tract, or block numbering area, or unit thereof, as published by the secretary of state under Section 6 of this Article, shall retain its integrity and shall not be divided between two or more districts.

(C) Each district created by the plan shall be composed of contiguous territory and be bounded by a single, non intersecting, continuous line.

(D) No district created by the plan shall have a compactness ratio of less than thirty-thousandths as calculated according to division (A)(5) of Section 6 of this Article, except in the case of districts wholly or partially included in counties having at least one congressional ratio of representation, where the minimum compactness ratio shall be twenty-four thousandths.

Section 9. (A) The secretary of state shall choose, from among the plans qualifying under Section 8 of this Article, one plan for congressional districts, in accordance with this section.

(B) The secretary of state shall determine for each qualifying plan, on the basis of the information provided on its summary sheet, the total number of county fragments contained in it and the total number of municipal fragments contained in it. The secretary of state shall designate the plan that has the fewest county fragments the apparent winner. He shall then make a detailed examination of the supporting documents of the apparent winner to determine whether the information provided on its summary sheet is true and correct. If it is, the secretary of state shall, not later than the fifteenth day of August in each year ending in one, declare that plan the winner and that plan shall be the plan in effect for the next ten years. He shall publish for public distribution the map and list of units comprising the districts in the plan chosen.

(C) If examination of the supporting documents of the apparent winner fails to verify the information provided on its summary sheet, that plan shall be

disqualified. The secretary of state shall then determine the apparent winner from the remaining plans and follow the same verification procedure used in division (B) of this section. If the data provided on the summary sheet of the second apparent winner cannot be verified, the verification procedure shall be repeated until the plan that best meets the criteria of this section is found.

(D) If two or more qualifying plans each contain the fewest county fragments, the secretary of state shall choose that plan that has the fewest municipal fragments, not counting those derived from municipal corporations that are included in more than one county. If two or more qualifying plans each contain the fewest municipal fragments, the secretary of state shall choose that plan whose least compact district has the highest compactness ratio.

(E)(1) If the least compact districts of two or more qualifying plans have the same compactness ratio when rounded to two significant figures, the secretary of state shall compare the compactness of the next least compact districts of those plans, and the plan whose district has the highest compactness ratio, when rounded to two significant figures, shall be chosen. If no plan can be chosen after comparing the next least compact districts, the secretary of state shall compare the third least compact districts, and so on, until one plan emerges as the preferred one.

When rounding the compactness ratio of a district to two significant figures, the second significant figure shall be rounded to the next higher numeral if the third significant figure is "five" and all subsequent figures are zeros, and if the second significant figure is an odd number. The second significant figure shall remain the same if the third

significant figure is "five" and all subsequent figures are zeros, and if the second significant figure is an even number.

(2) If two or more qualifying plans have the same compactness ratio for all of their districts when rounded to two significant figures, the secretary of state shall compare the compactness of the least compact districts of each of those qualifying plans when the compactness ratio is rounded to three significant figures. If no qualifying plan can be chosen after comparing those least compact districts, the secretary of state shall compare the next least compact district, and so on, until one qualifying plan emerges as the winning plan.

(F) The secretary of state shall not disqualify any plan because the plan or summary sheet contains minor technical errors that have no substantive effect.

Section 10 (C) The general assembly shall, by law, prescribe a procedure for numbering congressional districts that precludes the exercise of discretion in the assigning of numbers, and the districts of the chosen congressional districting plan shall be numbered accordingly.

(D) The general assembly may, by law, adjust:

(1) The dates specified in Sections 6 and 7, and division (B) of Section 9 of this Article to reflect the availability of census data, the time the secretary of state requires to process plans, the filing dates for primary elections, and other factors.;

(2) The filing fees provided for in division (B) of Section 6 of this Article to account for inflation.

Section 13. The boundaries of congressional districts from which members were elected to the one hundred seventh congress shall remain in effect until January 1, 2003 and the members of congress elected in the general election in 2000 shall hold office for the terms for which then elected.

Section 14. The various provisions of this article are intended to be severable, and the invalidity of one or more of such provisions shall not affect the validity of the remaining provisions.

APPENDIX E

LEGISLATIVE HISTORY OF OHIO ANTI-GERRYMANDER AMENDMENT

General Assembly	Date Introduced	Designation	Sponsors (underlined); Co-sponsors Democrats:	Republicans:	Disposition
112th	Sept. 15, 1978	H.J.R. 90	Dale Locker, Virginia Aveni, Gene Branstool, Sherrod Brown, Ronald James, Mike Stinziano, Dennis Wojtanowski	Claire Ball	Never referred to a standing committee
113th	Feb. 15, 1979	H.J.R. 15	Dale Locker, Paul Leonard, Robert Boggs, Gene Branstool, Sherrod Brown, John Begala, Ed Hughes, Ronald James, Dennis Wojtanowski	Claire Ball, John Galbraith	Never referred to a standing committee
	May 17,1979	S.J.R. 12		Sam Speck	Died in reference committee
114th	Jan. 21, 1981	H.J.R. 8	Dale Locker, Robert Boggs	Claire Ball	Never referred to a standing committee
	Jan. 30, 1981	S.J.R. 5		Sam Speck, Paul Matia	Three hearings by Senate Committee on Elections but no committee vote
115th	May 24, 1984	H.J.R. 35		Joan Lawrence, Ron Amstutz, Louis Blessing, Robert Brown, Jim Buchy, Joan Davidson, John Galbraith, Thomas Pottenger, Ben Rose, Marie Tansey	Never referred to a standing committee
	May 24, 1984	H.J.R. 36		John Galbraith, Louis Blessing, Jim Buchy, William Donham, Joan Lawrence, Thomas Pottenger	Never referred to a standing committee
116th	Nov. 12, 1985	H.J.R. 33		Joan Lawrence, Ron Amstutz, Louis Blessing, Jim Buchy, Joan Davidson, John Galbraith, Thomas Pottenger, Ben Rose, Marie Tansey	Never referred to a standing committee
	Nov. 12, 1985	S.J.R. 30	Gene Branstool	Robert Ney, Robert Cupp, Charles Horn, Donald Lukens, H. Cooper Snyder	Following hearings and markup, was recommended for passage, 5-4, by Cmte. on State Govt. on May 23, 1986; but never reached floor of Senate
117th	Feb. 17, 1987	H.J.R. 7		Joan Lawrence, Ron Amstutz, Gene Byers, Joan Davidson, Tom Johnson, E.J. Thomas, Dale VanVyven, Lynn Wachtmann	Never referred to a standing committee
118th	March 30, 1989	H.J.R. 7		Joan Lawrence, Ron Amstutz, William Batchelder, Louis Blessing, Gene Byers, Joan Davidson, David Johnson, Tom Johnson, Thomas Pottenger, E.J.Thomas, Dale Van Vyven, Lynn Wachtmann	Never referred to a standing committee

119th	March 19, 1991	H.J.R. 4	Jerry Krupinski, June Lucas	Joan Lawrence, Ron Amstutz, William Batchelder, Richard Rench	Never referred to a standing committee
120th	March 10, 1993	H.J. R. 2	Karen Doty, Jerry Krupinski, Daniel Troy	Joan Lawrence, Ron Amstutz, William Batchelder, Gene Krebs	Referred to Committee on State Government One hearing
121st	April 19, 1995	H.J.R. 16	Karen Doty, Daniel Troy	Joan Lawrence, Gene Krebs, John Garcia, J. Donald Mottley, George Terwilleger	Referred to Committee on State Government No Action
122nd	March 19, 1998	H.J.R. 25	John Bender, Ed Jerse, Peter Jones, Jerry Krupinski, June Lucas, Johnnie Maier, Darrell Opfer, Frank Sawyer, Vernon Sykes, Randy Weston	Joan Lawrence, Ron Amstutz, William Batchelder, Jim Buchy, John Carey, John Garcia, Richard Hodges, Gene Krebs, Priscila Mead, J. Donald Mottley, Robert Netzley, Dale VanVyven, Lynn Wachtmann	Referred to Committee on State Government; two hearings; chairman offered to take a committee vote, but sponsor declined
123rd	January 12, 2000	H.J.R. 13	Vernon Sykes	Ron Amstutz	Referred to Committee on Technology & Elections; six hearings; no mark-up & vote
124th	June 19, 2002	H.J.R. 4	Barbara Sykes , Dixie Allen, Kenneth Carano, Wayne Coates, George Distel, Teresa Fedor, Annie Key, Eileen Krupinski, Dale Miller, Chris Redfern, Ron Rhine, Fred Strahorn		Referred to Committee on State Governmet; Sponsor hearing offered